

State of Colorado



Bill Owens
Governor

John Zakhem
Board Chair

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Board Director

State Personnel Board
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AGENDA PUBLIC BOARD MEETING December 20, 2005

A public meeting of the State Personnel Board will be held on Tuesday, December 20, 2005, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604. The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by December 14, 2005.

I. REQUESTS FOR RESIDENCY WAIVERS

A. December 1, 2005 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

There are no pending matters before the Board this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

There are no Initial Decisions or Other Final Orders of the Administrative Law Judges or the Director on appeal to the Board this month.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

A. Vern Mirante v. Department of Natural Resources, Colorado State Parks, Steamboat Lake State Park, State Personnel Board case number 2005G074.

Complainant, a certified Park Resource Technician (PRT) for the Department of Natural Resources, filed a petition for hearing on February 4, 2005, arguing that Respondent denied him relief in a Step II grievance decision and that the final grievance decision was arbitrary and capricious because the decision does not explain why the Field Services PRT must work weekends, how Complainant could change his visitation schedule to permit him the opportunity to spend any time with his children during the school year, and

why park management accommodates schedules for certain employees in the department but refuses to do so for Complainant in this case.

Respondent argues that Complainant failed to meet his burden of showing that valid issues exist that merit a full hearing and this case concerns scheduling and the assignment of duties, both issues within the discretion of the appointing authority, rather than the State Personnel Board.

On November 7, 2005, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

B. Renee Dolman v. Department of Human Services, Division of Vocational Rehabilitation, State Personnel Board case number 2006G028.

Complainant, a certified Rehabilitation Counselor, employed by the Department of Human Services, Division of Vocational Rehabilitation, filed a petition for hearing on October 18, 2005, arguing that the final grievance decision was arbitrary and capricious because Respondent upheld a corrective action in which the policy cited by the appointing authority did not match the alleged incident.

Respondent argues that Complainant's petition for hearing does not state a claim for which the Board can grant a hearing. Respondent also argues that the Board does not have jurisdiction to grant a hearing on Complainant's grievance, and that Complainant does not present any legal arguments in support of her position.

On December 7, 2005, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

A. Wesley A. Lehman v. Department of Corrections, Arkansas Valley Correctional Facility, State Personnel Board case number 2005B125 (November 10, 2005).

Complainant, a major and a custody and control manager at the facility, appealed his disciplinary termination, seeking reinstatement, back pay and attorney fees and costs. After hearing, the ALJ determined that the credible and undisputed evidence established that Complainant drove 80 miles and reported to work in an intoxicated state on April 14, 2005, putting both the facility and the public at risk. Complainant contended that his medication prolonged and intensified the clearance of alcohol from his system and Complainant did not realize he was intoxicated. However, the ALJ ruled that Respondent's action was not arbitrary and capricious, as the warden considered an investigator's report and all written and oral information regarding the incident before making the decision to terminate Complainant's employment; and nothing in the literature Complainant provided regarding his medication supported Complainant's contention that the medication caused alcohol to stay in his system for a longer period of time, or would intensify the level of alcohol in his system. Finally, in affirming Respondent's action, the ALJ concluded that the discipline imposed was within the range of reasonable alternatives and attorney fees and costs are not warranted.

B. Consuelo Gonzales v. Department of Human Services, Colorado State Veterans Center, State Personnel Board case number 2005B091 (November 10, 2005).

Complainant, a nursing home activities director, appealed the disciplinary termination of her employment by Respondent, seeking reinstatement, back pay, benefits, and attorney fees and costs. After hearing, the ALJ concluded that Complainant used her position at the Veterans Center to gain control of an elderly resident's life, money and property and to become the sole beneficiary of his will, all of which constitute financial exploitation of a resident. In addition, Complainant accepted the resident's entire estate, two months of rent, and a \$13,000 hot tub, thus violating the Veterans Center Code of Ethics. Affirming the disciplinary termination of Complainant, the ALJ determined that Respondent's action in terminating her employment was not arbitrary, capricious, or contrary to rule of law; Respondent's action was within the range of reasonable alternatives; and attorney fees are not warranted.

- C. Terry J. Miller v. Department of Higher Education, University of Northern Colorado, State Personnel Board case number 2005B112 (November 14, 2005).

Complainant, a Pipe and Mechanical Trades II, appealed his disciplinary demotion, seeking reinstatement, back pay, benefits, and attorney fees and costs. After hearing, the ALJ found, among other things, that Complainant failed to perform at the level required of his position, was unable to follow his supervisor's directions, and was unable to maintain the focus necessary to complete tasks in a timely manner, despite the fact that his supervisor worked hard to help him improve. The ALJ ruled that the appointing authority exercised his decision with moderation, and thus, Respondent's actions were not arbitrary, capricious, or contrary to rule or law, and were within the range of reasonable alternatives. No attorney fees were awarded, as the ALJ affirmed Respondent's demotion of Complainant.

- D. Pedro Gomez & Linda Burnett v. Department of Labor and Employment, Workforce Development Programs, State Personnel Board case number 2005B136(C) (November 21, 2005).

Complainants, Labor and Employment Specialists V (Supervisor) and II respectively, appealed their terminations for consumption of alcohol in a state vehicle on state time. At hearing, the ALJ concluded that Complainants purchased a bottle of alcohol and drank it in the state vehicle while driving to Trinidad on business. With regard to Complainant Gomez, the ALJ found that Respondent's action was not arbitrary, capricious or contrary to rule or law, and termination was within the range of reasonable alternatives available to Respondent; Gomez's actions were such that he could no longer serve in his position of leadership in the community, and he breached the trust that the appointing authority needed to have in him as the holder of that position. With regard to Complainant Burnett, the ALJ found that Respondent's action was arbitrary, capricious or contrary to rule or law, and termination was not within the range of reasonable alternatives available to Respondent. The ALJ concluded, among other things, that Gomez's conduct placed Burnett in a difficult position, to terminate her for the decision to "go along with him" was unduly harsh, she does not hold the same high profile leadership position in the community that Gomez holds, and she is a stellar employee. Affirming the termination of Gomez, the ALJ ordered that Respondent's termination of Burnett is modified, permitting Respondent to impose a disciplinary suspension of the duration it deems appropriate against Burnett and then to reinstate her with back pay and benefits.

- E. Alice Hines v. Department of Corrections, Sterling Correctional Facility, State Personnel Board case number 2004B052(C) (November 21, 2005).

Complainant, a correctional officer, appealed her disciplinary demotion and subsequent termination, alleging that, in demoting her, Respondent discriminated against her on the basis of race and retaliated against her for having filed a race discrimination claim in her appeal of a previous abolition of her position, and that, in terminating her, Respondent

discriminated against her on the basis of race, sex, disability, and created a hostile work environment. After hearing, the ALJ concluded that Complainant committed the acts for which she was disciplined, including not being able to adhere to normal working hours, which caused disruption in her workplace; violating call-off procedures and failing to report for work, which demonstrated a disrespect for DOC administrative regulations and the directives of her supervisors; and willfully violating the mandatory testing requirement, although she knew it would result in a positive test result and the imposition of disciplinary action. Affirming Respondent's actions, the ALJ also determined that Respondent's actions were not arbitrary, capricious, or contrary to rule or law, and were within the range of reasonable alternatives; Respondent did not discriminate against Complainant on the basis of race, sex, or disability, and did not create a hostile work environment; and Complainant is not entitled to an award of attorney fees and costs.

- F. Wolney Cunha v. Department of Transportation, State Personnel Board case number 2005B006 (November 23, 2005).

Complainant, a professional engineer, appealed his termination, seeking reinstatement with back pay, a finding that CDOT violated the Colorado Whistleblower Act and/or the Colorado Anti-discrimination Act, and an award of attorney fees. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including pretending to point a gun at his supervisor and asking him how he would negotiate himself out of that situation, a willful violation of CDOT's workplace violence policy; sending an e-mail to CDOT's Executive Director which was inappropriate and demonstrated a lack of tact and diplomacy; failing to respond professionally in e-mails regarding his attendance at a meeting; and using improper forums to discuss issues which should have been discussed in a private meeting with his supervisor. In addition, the ALJ concluded that Complainant failed to establish that his disclosure regarding the Trinidad Phase II project was the substantial and motivating factor for his termination, thus failing to prove that the Whistleblower Act was violated, and failed to establish any circumstances that gave rise to an inference of unlawful discrimination based on either his age or his national origin. The ALJ affirmed Respondent's action, finding that it was not arbitrary, capricious or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives.

VI. REVIEW OF THE MINUTES FROM THE NOVEMBER 15, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS NOVEMBER 15, 2005 PUBLIC MEETING:

- A. Timothy Bennett v. Department of Corrections, Fort Lyon Correctional Facility, State Personnel Board case number 2005G028.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- B. Bridget G. Watkins v. Department of Public Health and Environment, Division of Disease Control and Environmental Epidemiology, State Personnel Board case number 2006G005.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- C. Frederick J. Beall, Gregory J. Bublitz and Gilbert R. Dickman v. Trustees of the Colorado School of Mines, Colorado School of Mines, State Personnel Board case number 2006G020 (C).

The Board voted not to accept Respondent's Request for Board Consideration of Jurisdictional Issues for review by the Board and to adopt the Preliminary Recommendation of the Administrative Law Judge and grant Complainants' petition for hearing.

- D. William J. Kaberlein v. Department of Labor and Employment, Unemployment Insurance, State Personnel Board 2005G096.

The Board voted not to accept the Department of Personnel and Administration's Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene, and to adopt the Preliminary Recommendation of the Administrative Law Judge and grant Complainant's petition for hearing.

- E. Lynn Redden v. Department of Labor and Employment, Unemployment Insurance, State Personnel Board 2005G094.

The Board voted not to accept the Department of Personnel and Administration's Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene, and to adopt the Preliminary Recommendation of the Administrative Law Judge and grant Complainant's petition for hearing.

The Board voted to issue an order to show cause in 2005G094 and 2005G096 as to why the matters should not be consolidated.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

- Staff Activities

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. PROPOSED LEGISLATION AND/OR RULEMAKING

XI. EXECUTIVE SESSION

A. Case Status Report

B. Minutes of the November 15, 2005 Executive Session

C. Other Business

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

January 17, 2006	Department of Human Services Colorado Mental Health Institute at Pueblo 1600 West 24th Street Pueblo, Colorado 81003
February 21, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
March 21, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
April 18, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
May 16, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
June 20, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604